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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 In re
DIANE J. BEALL

Bankruptcy Case No. 10-16454-LT13

Adversary Case No. 11-90028-LT

12
13 DIANE J. BEALL, an individual,

14 Plaintiff,

15 vs.

16 ONEWEST BANK, FSB, ITS ASSIGNS
AND/OR SUCCESSORS IN
17 INTEREST; and all such persons
claiming by, through, or under such
person, all persons unknown, claiming
18 any legal or equitable right, title, estate,
lien, or interest in the property described
19 in the complaint adverse to Plaintiff's
title thereto; and DOES 1-10, Inclusive,
20 Defendants.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS ADVERSARY
COMPLAINT FOR FAILURE TO
STATE A CLAIM

Date: July 12, 2011

Time: 10:00 a.m.

Ctrm: 3

Judge: Hon. Laura S. Taylor

Complaint Filed: January 22, 2011

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Defendant OneWest Bank, FSB ("OneWest") submits the following memorandum of points and authorities in support of its motion to dismiss the Adversary Complaint of Plaintiff Diane J. Beall ("Beall"), pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6), which is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure, Rule 7012. In the alternative, OneWest moves for an order requiring Beall to provide a more definite statement of her claims, pursuant to Federal Rules of Civil Procedure, Rule 12(e).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This action concerns Beall's admitted default on a residential mortgage loan. Beall filed for Chapter 13 bankruptcy protection after she defaulted on her loan. OneWest objected to Beall's proposed Chapter 13 plan because the plan is not feasible. Beall argues that OneWest lacks any interest in her loan and, therefore, lacks standing to object to the confirmation of Beall's proposed Chapter 13 plan. Beall's bald, conclusory claims lack any factual or legal support and are thus insufficient to state a claim for relief against OneWest. Accordingly, OneWest respectfully requests an order, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), dismissing each cause of action in the Complaint with prejudice or, in the alternative, an order requiring Beall to provide a more definite statement of her claims, pursuant to Federal Rules of Civil Procedure, Rule 12(e).

II. FACTS.

A. OneWest Possesses a Valid Interest in Beall's Mortgage Loan.

On July 20, 2004, Beall entered the mortgage loan transaction to purchase a single family residence located at 16377 Arnold Avenue, Lake Elsinore, California (the "Property"). (Complaint, ¶ 4; Request for Judicial Notice ["RJN"], Exhibit "A.") On July 11, 2009, the Office of Thrift Supervision closed IndyMac, appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver for IndyMac under 12 U.S.C. §§ 1464(d)(2)(A) and 1821(c)(5), chartered a new institution, IndyMac

1 Federal Bank, FSB ("IndyMac Federal"), as successor-in-interest, and appointed the
 2 FDIC as Conservator to operate the new institution. See Ibarra v. Plaza Home
 3 Mortg., No. 08-CV-01707-H (JMA), 2009 WL 2901637, at *2 (S.D. Cal. Sept. 4,
 4 2009).

5 On March 10, 2010, the FDIC, as receiver for IndyMac Federal, recorded a
 6 Corporate Assignment of Deed of Trust, assigning Beall's Deed of Trust and Note
 7 to OneWest. (RJN, Exhibit "B."). On May 25, 2010, Quality Loan Service
 8 Corporation ("Quality") recorded a Notice of Default. (RJN, Exhibit "C.") On
 9 July 7, 2010, a Substitution of Trustee was recorded that substituted Quality as
 10 Trustee under the Deed of Trust in place of the original Trustee, First American
 11 Title Insurance Company. (RJN, Exhibit "D.") On August 27, Quality filed a
 12 Notice of Trustee's Sale (RJN, Exhibit "E.")

13 **B. Beall Filed a District Court Action to Challenge OneWest's**
 14 **Standing to Foreclose on the Property.**

15 Beall filed a virtually identical lawsuit on September 13, 2010 in the United
 16 States District Court, Southern District of California, entitled Diane Beall fka
 17 Templin v. Quality Loan Service Corp., et al., bearing Case No. 10-CV-1900
 18 IEG(WVG) (the "District Court Action"). That same day, Beall requested, on an
 19 *ex parte* basis, a temporary restraining order barring OneWest from selling the
 20 Property at a Trustee's Sale. The Honorable Irma E. Gonzalez denied Beall's
 21 *ex parte* application. (RJN, Exhibit "F"). OneWest thereafter filed a motion to
 22 dismiss Beall's Complaint in the District Court Action. The Honorable Irma E.
 23 Gonzalez granted OneWest's motion, with leave to amend. (RJN, Exhibit "G").
 24 Beall filed an amended Complaint, but the amended Complaint was similarly
 25 deficient. Accordingly, OneWest filed a motion to dismiss Beall's amended
 26 Complaint, which the Honorable Irma E. Gonzalez will hear on March 7, 2011.

27
 28

C. Beall Filed this Action to Similarly Challenge OneWest's Standing to Foreclose on the Property.

Beall avers that OneWest has no interest in her mortgage loan. (Complaint, ¶ 10.) Beall contends that any assignment of her loan to OneWest was improper. (Complaint, ¶¶ 12, 13.) Beall alleges an "Examination and Audit Report" prepared by Charles Horner, supports her claims. Beall indicates that Mr. Horner's report is attached to the Complaint as Exhibit A. (Complaint, ¶ 12.) There are no exhibits attached to Beall's Complaint. Beall also contends that "[i]n order to lawfully foreclose, the security interests, *i.e.*, the Deed of Trust and Note, must be delivered to and in possession of the foreclosing trustee," *i.e.*, that the entity foreclosing on her mortgage loan must "produce the note" in order to validate its standing. (Complaint, ¶ 14.) On this basis, Beall requests an order declaring that OneWest has no interest in her mortgage loan or Property.

III. STANDARD FOR RULE 12(b)(6) MOTION.

"A complaint may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). In evaluating a motion to dismiss under Rule 12(b)(6), a court must accept as true the factual allegations of the complaint; however, "a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast as factual allegations." Sony Pictures Entertainment, Inc. v. Fireworks Entertainment Group, Inc., 156 F.Supp.2d 1148, 1153 (C.D. Cal. 2001).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). The pleading standard which a complaint must satisfy "does not require 'detailed factual

1 allegations,' but it demands more than an unadorned, the-defendant-unlawfully-
2 harmed-me accusation." Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009).

3 Finally, for a Rule 12(b)(6) motion, a court generally cannot consider material
4 outside the complaint. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994).

5 A court may, however, consider exhibits submitted with the complaint. Van Winkle
6 v. Allstate Ins. Co., 290 F.Supp.2d 1158, 1162 n.2 (C.D. Cal. 2003). A court may

7 treat such document as "part of the complaint, and thus may assume that its contents
8 are true for purposes of a motion to dismiss under Rule 12(b)(6)." United States v.

9 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). A court may disregard allegations in the

10 complaint if they are contradicted by facts established by exhibits attached to the

11 complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

12 Thus, this Court may consider pertinent loan and foreclosure documents submitted
13 by Beall and OneWest.

14 **IV. LEGAL ARGUMENT.**

15 **A. Beall Predicates Each Cause of Action on Her False Assertion that** 16 **OneWest Lacks an Interest in the Loan.**

17 Each of Beall's claims rest on her erroneous assertion that OneWest does not
18 possess any interest in her mortgage loan. (Complaint, ¶ 10.) Beall's allegations
19 contradict judicially-noticeable facts. On March 10, 2010, the FDIC, as receiver for
20 IndyMac Federal, recorded a Corporate Assignment of Deed of Trust, assigning the
21 Deed of Trust and Note to OneWest. (RJN, Exhibit "B."). Beall's allegations
22 contradict the public record and must be disregarded. Durning, 815 F.2d at 1267
23 (A court may disregard allegations in the complaint if they are contradicted by facts
24 established by exhibits).

25 **B. Beall's Arguments Based on the "Produce the Note" Theory Fail.**

26 Each cause of action asserted by Beall rests on her mistaken belief that
27 OneWest must "produce the note" before conducting a trustee's sale of the Property.
28 (See, e.g., Complaint, ¶ 24.) This "produce the note" argument, raised in many

actions by borrowers seeking to delay or avoid foreclosure, is meritless. California courts consistently reject this argument because "the statutory framework governing non-judicial foreclosures contains no requirement that the lender produce the original note to initiate the foreclosure process." Gamboa v. Trustee Corps., 2009 WL 656285 at *4 (N.D. Cal. 2009); see also Puttkuri v. Recontrust Co., 2009 WL 32567 at *2 (S.D. Cal. 2009) ("Pursuant to section 2924(a)(1) of the California Civil Code, the trustee of a Deed of Trust has the right to initiate the foreclosure process... Production of the original note is not required to proceed with a non-judicial foreclosure."); Candelo v. NDEX West, LLC, 2008 WL 5382259 at*4 (E.D. Cal. 2008); San Diego Home Solutions, Inc. v. Recontrust Co., 2008 WL 5209972 at *2 (S.D. Cal. 2008). The law is clear that Beall's "produce the note" argument fails to substantiate any cause of action contained in the Complaint.

C. Beall's Truth in Lending Act ("TILA") Claim Is Time-Barred.

Beall seeks statutory damages under TILA despite the fact that this claim is time-barred. Civil penalties under TILA are subject to a one-year statute of limitation. 15 U.S.C. § 1640(e). It is well-settled that "an action for damages under TILA must be brought within one year from the alleged violation." Eubanks v. Liberty Mortgage Banking, Ltd., 976 F.Supp. 171, 174 (E.D.N.Y. 1997). The violation occurs and the one-year limitation period accrues upon consummation of the loan. Betancourt v. Countrywide Home Loans, Inc., 344 F.Supp.2d 1253, 1258 (D. Colo. 2004), see also 12 C.F.R. § 226.2(a)(13) (a loan is deemed consummated at "the time a consumer becomes contractually obligated on a credit transaction"); Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 901 (9th Cir. 1971) (stating that the "failure to make the required disclosures occurred, if at all, at the time the loan documents were signed"). Here, Beall concedes that she obtained the loan in July 2003 but failed to file the instant action until January 2011. The claim is thus time-barred.

28

1 While the "doctrine of equitable tolling may, in the appropriate
 2 circumstances, suspend the limitations period until the borrower discovers or had a
 3 reasonable opportunity to discover the fraud or nondisclosures that form the basis of
 4 the TILA action," Beall has not alleged specific facts demonstrating that she could
 5 not have discovered the alleged violations by exercising reasonable diligence. King
 6 v. California, 784 F.2d 910, 913 (9th Cir. 1986); Meyer v. Ameriquet Mortg. Co.,
 7 342 F.3d 899, 902 (9th Cir. 2003) (refusing to apply equitable tolling to TILA claim
 8 because the plaintiff was in full possession of all loan documents and did not allege
 9 any concealment of loan documents or other action that would have prevented
 10 discovery of the alleged TILA violations). Thus, Beall has not pleaded facts giving
 11 rise to equitable tolling.

12 **D. Beall's Cause of Action for Fraud Is Woefully Deficient and**
 13 **Undermined by Judicially-Noticeable Facts.**

14 Beall baldly alleges that OneWest committed fraud by representing that it
 15 possessed an interest in her mortgage loan. No claim is stated. Allegations of fraud
 16 must meet the heightened pleading standards of Federal Rule of Civil Procedure
 17 9(b), which require allegations of "particular facts going to the circumstances of the
 18 fraud, including time, place, persons, statements made and an explanation of how or
 19 why such statements are false or misleading." A plaintiff must therefore include
 20 "the who, what, when, where, and how of the fraud." Vess v. Ciba-Geigy Corp.
 21 USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citation omitted). A "plaintiff
 22 must set forth what is false or misleading about a [specific] statement, and why it is
 23 false." Decker v. Glenfeld, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994).

24 Further, "[w]here multiple defendants are asked to respond to allegations of
 25 fraud, the complaint must inform each defendant of his alleged participation in the
 26 fraud." Ricon v. Recontrust Co., 2009 WL 2407396, *3 (S.D. Cal. 2009); Swartz v.
 27 KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) ("[R]ule 9(b) does not allow a
 28 complaint to merely lump multiple defendants together but 'require[s] plaintiffs to

1 differentiate their allegations ... and inform each defendant separately of the
 2 allegations surrounding his alleged participation in the fraud.' [A] plaintiff must, at
 3 a minimum, 'identif[y] the role of [each] defendant[] in the alleged fraudulent
 4 scheme.'" (internal citation omitted).

5 Here, Beall's impermissibly broad and general allegations fail to state a claim
 6 for fraud against OneWest. Beall merely alleges that "OneWest falsely represented
 7 to Plaintiff that they received valid assignment of the Deed of Trust." (Complaint,
 8 ¶ 66.) Beall fails to include "the who, what, when, where, and how of the fraud," as
 9 required by Vess and its progeny. 317 F.3d 1097 at 1106. Accordingly, Beall's
 10 fraud claim fails as a matter of law.

11 **E. Beall Fails to Demonstrate that OneWest Published False**
 12 **Information that Harmed Her and, Therefore, Cannot State a**
 13 **Claim for Libel.**

14 Beall contends that OneWest committed libel when the FDIC, as receiver for
 15 IndyMac Federal, recorded a Corporate Assignment of Deed of Trust, assigning the
 16 Deed of Trust and Note to OneWest. (RJN, Exhibit "B."). Under California law,
 17 "[l]ibel is a false and unprivileged publication ... which exposes any person to
 18 hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or
 19 avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code §
 20 45. It is unclear how IndyMac Federal's recordation of a Corporate Assignment of
 21 Deed of Trust constitutes libel, as the information contained in the Corporate
 22 Assignment of Deed of Trust is accurate. Thus, Beall's libel claim fails.

23 **F. The Complaint Fails to State a Claim for Quiet Title because Beall**
 24 **Has Not Tendered Back Her Debt.**

25 Beall seeks to quiet title to the Property in her name alone, without repaying
 26 the sums due under her mortgage loan. The law is settled, however, that "a
 27 mortgagor may not quiet title against a mortgage unless and until he pays his debt
 28 secured by the mortgage." Kays v. Bundy, 92 Cal.App.2d 497, 499 (1949), citing

1 Fontana Land Co. v. Laughlin, 199 Cal. 625, 639 (1926). Beall cannot simply
 2 "quiet title without discharging [her] debt. The cloud upon [her] title persists until
 3 the debt is paid." Aguilar v. Bocci, 39 Cal.App.3d 475, 477 (1974). Here, Beall has
 4 not repaid her debt and, thus, cannot advance a claim for quiet title.

5 **V. BEALL SHOULD BE ORDERED TO PROVIDE A MORE DEFINITE**
 6 **STATEMENT OF ANY REMAINING CLAIMS.**

7 If this Court does not dismiss all of the causes of action asserted in
 8 Complaint, the Court should order Beall to provide a more definite statement of the
 9 remaining claims. Rule 12(e) authorizes a motion for more definite statement to be
 10 granted when the pleading is "so vague or ambiguous that [the defendant] cannot
 11 reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e). The
 12 Complaint fails to "plead a short and plain statement" of the elements of Beall's
 13 claims. Furthermore, the Complaint fails to satisfy the standard requiring "more
 14 than labels and conclusions" to plead claims that are "plausible on [their] face." Bell
 15 Atlantic, 550 U.S. at 545, 547. If this Court allows any of Beall's claims to survive,
 16 Beall should be ordered to set forth in detail the specific facts supporting each count
 17 they assert.

18 **VI. CONCLUSION.**

19 For the foregoing reasons, OneWest respectfully requests that the Court grant
 20 the Motion to Dismiss Beall's adversary Complaint, with prejudice.

21
 22 Dated: February 22, 2011

ALLEN MATKINS LECK GAMBLE
 MALLORY & NATSIS LLP
 DAVID R. ZARO
 RYAN T. WAGGONER

23
 24
 25 By: /s/ Ryan T. Waggoner

RYAN T. WAGGONER
 Attorneys for Defendant
 ONEWEST BANK, FSB

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action. My business address is 515 South Figueroa Street, Ninth Floor, Los Angeles, California 90071-3309.

On February 22, 2011, I served the within document(s) described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO DISMISS ADVERSARY COMPLAINT FOR
FAILURE TO STATE A CLAIM**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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☐ **COURTESY COPY BY MAIL:** I placed a true copy of the document in a sealed envelope or package addressed as indicated above in Los Angeles, California for collection and mailing pursuant to the firm's ordinary business practice. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

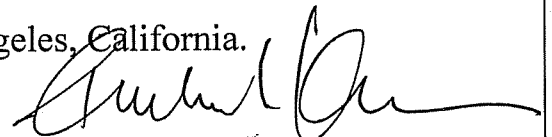
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I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on February 22, 2011, at Los Angeles, California.

Frederick Kalve

(Type or print name)



(Signature of Declarant)